No. 75-1105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

McCANN L. REID, PETITIONER,

v.

MEMPHIS PUBLISHING COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent does not accept petitioner's first "Question Presented" which is as follows:

"1. Whether Title VII of the Civil Rights Act of 1964, as implemented by Guidelines promulgated by the Equal Employment Opportunity Commission, requires employers to make reasonable efforts to accommodate their work schedules and practices to the religious observances of their employees, unless it is shown that such an accommodation would impose an undue hardship on the conduct of the employer's business." (Pet. 2)

Respondent agrees that the Guidelines require employers to make reasonable efforts to accommodate their work schedules and practices to the religious observances of their employees, unless it is shown that such an accommodation would impose an undue hardship on the conduct of the employer's business, but the Court of Appeals has found that, on the facts in this case, such accommodation would impose an undue hardship on the conduct of

respondent's business. So, the question in this Court is whether the Court of Appeals was in error in so finding.

Respondent does not accept petitioner's second "Question Presented" which is as follows:

"2. Whether the mere possibility that resentment might be created among other employees justifies an employer's refusal to make any effort to accommodate its work schedules to the religious observances of an employee." (Pet. 2)

In creating this question petitioner has picked out only one of the several factors upon which the finding of undue hardship by the Court of Appeals was based, omitting the others. Respondent suggests as a more appropriate question: Whether, on the facts in this case, the Court of Appeals was in error in finding that an accommodation to petitioner's religious observances would impose an undue hardship on the conduct of respondent's business.

Petitioner's third "Question Presented" is as follows:

"3. Whether the majority of the Court of Appeals, on the basis of a *de novo* review of the evidence, properly rejected the trial court's finding that an accommodation of respondent's work schedules to petitioner's religious observances would not impose an undue hardship on the conduct of respondent's business." (Pet. 2)

Respondent does not accept this question insofar as it implies or assumes that the Court of Appeals conducted a *de novo* review of the evidence, but respondent agrees that, if certiorari should be

granted, there would be presented for this Court's consideration the question whetner the majority of the Court of Appeals properly rejected the trial court's finding that an accommodation of respondent's work schedules to petitioner's religious observances would not impose an undue hardship on the conduct of respondent's business.

Respondent does not accept petitioner's fourth "Question Presented" which is as follows:

"4. Whether the standard adopted by the courts below for the award of attorney's fees in Title VII cases, under which such awards are rigidly denied to all plaintiffs who do not represent a class and are not granted injunctive relief, is consistent with this Court's contrary interpretation of other identical provisions of the 1964 Civil Rights Act and with Congress' goal of encouraging judicial actions by victims of religious and racial discrimination." (Pet. 3)

Respondent offers instead the following question:

Did the District Court abuse its discretion in disallowing petitioner an attorney's fee?

STATEMENT OF THE CASE

This Statement is made by way of clarification and amplification of petitioner's Statement of the Case.

The Press-Scimitar's copy desk is a kind of reduction or selection department of news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news,

national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write headlines and subheads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copyreaders assist the News Editor in this task. (App. 41a)

Copyreaders develop special abilities in addition to their general abilities, and normal operations require a crew of copyreaders who possess expertise and experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section; special features, makeup and markets. Because of this need for special skills, all copyreaders are not interchangeable with all other copyreaders. (App. 41a,42a)

The only position which the Press-Scimitar had open was one which required work on Saturdays, and the copyreader whom petitioner was to replace, if he were hired, worked on Saturdays. The fact that petitioner would not work on Saturdays created the problem. (App. 6a)

The normal complement of copyreaders is ten, including the News Editor who mans the slot position when on duty. Even under ordinary circumstances, without anyone claiming special privileges, the work-scheduling of copyreaders presents a difficult task. This task is performed by the News Editor, with the approval of the Editor. In making the assignments he must take into account the special skills of each copyreader and his

adaptability for the work. While some copyreaders possess more than one specialty, in addition to their general ability, none possesses all of the specialties. The normal workday for copyreaders is eight hours; it ranges, however, from five o'clock a.m. until 4:30 p.m., except on Saturday when it extends only to 1:30 p.m. This range of time usually requires two different persons to man the slot position on days other than Saturday. The News Editor must take into account absences of copyreaders on account of accident, illness and vacation. Vacations run for two, three or four weeks, depending on length of service. Seniority is taken into account also. Moreover, the heaviest publication days are the first five days of the week, and the best qualified copyreaders are usually assigned to work on those days, leaving Saturdays as their day off. The fact that the copyreaders are few in number, are specialists, and all are not interchangeable are some of the things that distinguish this case from other cases in which the employees are more numerous and interchangeable. (App. 7a,8a,42a)

The Respondent offered proof to show that the employment of petitioner would impose an undue hardship upon it in various ways: To have employed petitioner with Saturdays guaranteed off would have defeated the very purpose for which his employment was desired, i.e., to fill a Saturday vacancy; manpower shortage on Saturdays would require involuntary assignment of the more senior copyreaders to the Saturday schedule with accompanying problems of decreased efficiency of production on the heavier days, payment of overtime and lowered morale for the senior employees impressed into Saturday service; or the employment of another copyreader in addition to petitioner; difficulty of work-scheduling in case of personnel interchange; petitioner would never be available for work

on Saturdays, even in an emergency when momentous news breaks, which has to be processed immediately; and frustration of respondent's long-range planning in that petitioner, because he would not work on Saturdays, could not be considered for promotion to such managerial positions as News Editor, Managing Editor and Editor, all of whom work on Saturdays when necessary. (App. 6a-9a, 42a-46a)

The District Court found that the employment of petitioner under such circumstances, although imposing a hardship, would not impose an *undue* hardship on respondent. (App. 46a) The Court of Appeals reversed the award of damages, holding the District Court's finding to be not supported by substantial evidence and clearly erroneous, and itself finding that such employment of petitioner would have imposed undue hardship upon petitioner. The judgment of the District Court which denied petitioner any recovery for attorney's fees was affirmed. (App. 10a,11a,18a)

The District Court found that the respondent did not intentionally discriminate against petitioner either on account of his race or his religion. (App. 1a,46a,69a)

REASONS FOR DENYING THE WRIT

Although respondent readily agrees that the questions and issues raised by Title VII of the Civil Rights Act of 1964, many of which have not been answered, are most certainly of national significance, it cannot agree that this case offers a proper vehicle for the Supreme Court's determination of such questions and issues. Actually, the basic issues in this case involve "facts" and "discretion."

The District Court found from the facts in this particular case that it would not impose an undue hardship on respondent to employ to fill a Saturday vacancy an employee who would not work on Saturdays. (App. 46a) The Court of Appeals rejected the District Court's finding and found that the employment of petitioner would have imposed an undue hardship on the conduct of respondent's business. (App. 10a,11a) As to hardship, the issue involves facts.

Petitioner says that the majority opinion of the Court of Appeals challenges the authority of the Equal Employment Opportunity Commission to adopt the 1967 Guidelines and that its opinion relating thereto is in conflict with decisions of other circuits. (Pet. 10)

The opinion of the District Court is based upon two grounds: I. That the employment of petitioner would have imposed an undue hardship on the conduct of respondent's business, (App. 5a-11a) and II. That the EEOC exceeded its authority in adopting the 1967 Guidelines. (App. 11a-18a) Even if the Court of Appeals should be in error on ground II of the majority opinion, there would still remain in effect the factual finding in ground I that the employment of petitioner would have imposed undue hardship on the conduct of respondent's business. So, as to hardship, the issue involves facts.

Petitioner says that this case presents an opportunity for this Court to establish guidelines for the benefit of district courts in awarding attorneys' fees. (Pet. 11) However, the Act itself sets the guidelines, namely, the discretion of the trial court. So, as to attorney fees, the issue involves discretion.

A case in which the basic issues turn on "facts"

and "discretion" is not, it is respectfully submitted, a proper case for certiorari.

ARGUMENT

I.

Petitioner complains that the Court of Appeals failed to require respondent to make any effort to accommodate its business practices to petitioner's religious observances. (Pet. 12)

But the Guidelines impose no such requirement upon an employer unless the accommodation can be made without undue hardship on the conduct of the employer's business. Whether an employer makes an effort or does not make an effort is not the test. The test is whether such accommodation would or would not impose undue hardship upon the employer. This is evident from the Guidelines themselves which provide in part as follows: "(b) The Commission believes that the duty not to discriminate *** includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees *where such accommodations can be made without undue hardship on the conduct of the employer's business.*" (App. 14a) (Emphasis supplied)

Petitioner then goes on to say that, "The majority opinion below disregarded well-settled rules for the application of the EEOC's Guidelines", making the argument that the Court of Appeals' majority opinion is in error in taking the view that the EEOC overstepped its statutory authority in adopting the 1967 Guidelines, which for the first time imposed upon employers the duty to accommodate the religious observances of employees whether or not actual

discrimination existed. Petitioner says that certiorari should be granted to enable the Supreme Court "to resolve the conflict among the Circuits and to reestablish the principles that were repudiated by the majority opinion below." (Pet. 15)

But, petitioner overlooks the fact that in part I of the majority opinion the Court of Appeals, whether right or wrong in its part II, found that the employment of petitioner would have imposed undue hardship on the respondent. Both the District Court and the Court of Appeals found the respondent innocent of discrimination; and respondent has borne the burden of two trials and two appeals up to this point. It would work a monstrous injustice upon respondent for certiorari to be granted for the sole and only purpose of resolving the alleged conflict between pronouncements in other Circuits and the pronouncement of the Sixth Circuit in part II of the majority opinion when the respondent would still be entitled to final judgment in its favor based upon the factual finding of "undue hardship" contained in Part I of the majority opinion.

Rspondent respectfully suggests that some other case in which the final judgment would abide this Court's resolution of the alleged conflict among the Circuits, and one perhaps in which a constitutional question under the Establishment Clause might be involved, would be a more suitable case for the grant of certiorari.

II.

Petitioner argues that the mere possibility of resentment among other employees cannot justify respondent's refusal to attempt to accommodate petitioner's religious beliefs. (Pet. 16)

If the possibility of resentment among other employees constituted the sole ground supporting the Court of Appeals' finding of "undue hardship" there might be some merit to petitioner's contention. But there are other grounds, as will be seen from the discussion which follows.

III.

Petitioner contends that the majority of the Court of Appeals disregarded the finding of the District Court that the respondent would not suffer undue hardship if it accommodated its business practices to petitioner's religious observances. (Pet. 18)

At the outset it may be noted that the District Court found that the respondent's employment of petitioner with all Saturdays guaranteed off would impose hardship upon respondent but would not impose "undue" hardship. (App. 46a) The District Court made no attempt to distinguish between hardship and undue hardship.

The petitioner avers that the Court of Appeals engaged in a *de novo* review of the evidence. It has been said that a *"de novo* review" is a trial anew in the fullest sense, with findings of the trial court being given no weight, with the exception that great weight will be given to the tribunal who had the opportunity to see and hear witnesses and thus be better able to weigh their credibility on disputed issues of fact.

There was certainly no "trial anew," and in any event it does not appear that the Court of Appeals in its majority opinion failed to accord the proper weight to the District Court's findings. Of course, the District Court's findings of fact are not to be set aside

unless clearly erroneous. The Court of Appeals (majority) applied the "clearly erroneous" test. It said, "In our opinion the ultimate finding of the District Court that the accommodation of Reid's religious practice of not working on Saturdays would not have imposed an undue hardship on his employer, is not supported by substantial evidence and is clearly erroneous." (App. 11a)

Petitioner avers that the District Court heard conflicting testimony from witnesses who offered their opinion as to whether an accommodation to petitioner's religious observances would create resentment among other employees, and petitioner charges that the Court of Appeals substituted its judgment for that of the District Court "who heard the testimony and had an opportunity to observe the demeanor of the witnesses." (Pet. 18)

In truth, it is by no means clear whether the District Court found that the involuntary assignment of other employees, who customarily did not work on Saturday, to work on Saturday in place of petitioner would or would not cause resentment and lowered morale on their part. Said the Court:

> The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copyreader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copyreaders, with the exception of the News Editor himself, are required to work from time to time on Saturday, in

order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copyreaders are not interchangeable. However, the proof also shows that Saturday work is infrequent for some copyreaders and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copyreaders with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment. (App. 44a)

• • •

Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copyreaders of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be con-

> sidered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof. (App. 46a)

It is noted that in the first paragraph quoted above the Court states that the parties offered opposing opinion testimony on the morale question; in the second quoted paragraph the Court comments upon the "possible effect of morale of other employees;" and in the last quoted paragraph the Court states that, "While it is true that the plantiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof." From which it would appear that the District Court made no finding either way regarding the morale problem. If this be true, the Court of Appeals' finding that the involuntary assignment of other copyreaders who would have seniority over petitioner, to substitute for him on Saturdays, would create havoc and serious morale problems among respondent's employees is not at odds with any finding made by the District Court. (App. 11a,18a)

By the same token it appears that the District Court made no finding on petitioner's proof of economic burden, as shown by the following excerpt from the opinion:

> Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copyreader. However, the proof in this regard was not specific and the amount of the addi-

tional economic burden incident to such overtime or employment of personnel was not shown. (App. 44a)

From all of which it appears that the District Court based its "no undue hardship" finding solely on "the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling."

On the contrary, the Court of Appeals in its majority opinion found that the forced employment of petitioner with all Saturdays guaranteed off would impose undue hardship upon respondent, saying:

> The undue hardship imposed on the Press-Scimitar in the present case, as shown by the evidence and the findings of fact of the District Court include:
>
> (1) Requiring it to employ Reid as a copyreader in a position which regularly required working on Saturdays, and to replace an employee who worked on Saturdays, when Reid declined to work on these days because of his religious beliefs and practices as a Seventh Day Adventist.
>
> (2) To employ Reid would require the employer to assign, involuntarily, other copyreaders who would have seniority over Reid, to take his place, thereby incurring overtime expense amounting to $77 per day. The Editor testified that even overtime was not a reasonable alternative, and that it would probably be necessary to employ an additional copyreader. Thus, to employ Reid would require the employer to employ two copyreaders, when it needed only one.

> (3) The involuntary assignment of other copyreaders to work on Saturday to substitute for Reid, when they had seniority over Reid, who had no seniority, would create serious morale problems among the other copyreaders. (App. 10a,11a)

The Court of Appeals also noted that the forced employment of petitioner with all Saturdays guaranteed off would saddle respondent with an employee who could never be called upon to work on Saturday, even in an emergency when momentous news breaks, which has to be processed immediately; and one who could not be considered for promotion to managerial positions such as News Editor, Managing Editor and Editor, all of whom work on Saturdays when necessary. (App. 6a,9a)

IV.

Petitioner contends that the courts below denied attorney's fees to petitioner on the ground that he did not represent a class and did not obtain injunctive relief. Respondent disputes such contention and denies that the District Court disallowed attorney's fees on such ground.

The Act provides that the trial court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." The District Court recognized its discretion to award an attorney's fee in this case. Two general purposes, according to the Court, exist for the imposition of such an award. The first is to punish defendants for pursuing frivolous arguments. But, the Court recognizes and the record demonstrates that serious questions have been

posed by this case relating to the duty to make religious accommodation. At no time have the motives of respondent ever been challenged or has it been suggested that frivolous arguments were being pursued.

The second purpose of granting attorney's fees is "to encourage individuals to vindicate the strongly expressed congressional policy against discrimination proscribed by the Act." In regard to this latter purpose, the Court stated that strong factors are whether the plaintiff has filed a class action and has been awarded injunctive relief. In this, the Court is absolutely correct. The existence of a class action or the grant of injunctive relief directly relates to the concept of private attorney generals which Title VII seeks to encourage. No where, however, except in petitioner's petition does the Court state that these two factors are prior conditions to the exercise of discretion, much less that in their absence no attorney's fees can be granted. The Court merely stated that they were strong factors to consider, and as to discrimination the Court expressly found that respondent did not discriminate against petitioner either on account of his race or his religion. (App. 46a,69a)

The District Court, in light of all the circumstances detailed by it in its exposition of the proof, concluded that "its discretion should be exercised by not awarding the plaintiff attorney's fees." Attorney's fees are discretionary, not mandatory, and the decision of the District Court should stand, absent a demonstration by petitioner of abuse of discretion.

SUMMARY OF ARGUMENT

As to damages, the issue turns on facts. As to attorney's fees, the issue turns on discretion. The issues do not merit the grant of certiorari. A more appropriate case for review by this Court, it is submitted, would be one in which the constitutionality of the 1967 Guideline's religious accommodation mandate is under attack.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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